

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Lead BK Case: 08-99000-smb

4 Lead BK Titles: Administrative Case Re: 08-01789

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6 In the Matter of:

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8 ADMINISTRATIVE CASE RE: 08-01789 (SECURITIES INVESTOR

9 PROTECTION CORPORATION),

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11 Debtor.

12 - - - - - x

13

14 United States Bankruptcy Court

15 One Bowling Green

16 New York, NY 10004

17

18 November 9th, 2017

19 2:10 PM

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21 B E F O R E :

22 HON STUART M. BERNSTEIN

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: MICHELLE BROWN

1 HEARING re Omnibus "Profit Withdrawal" Proceeding: Pre-Trial  
2 Conference

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4 HEARING re Discovery Conference re Warehouse and Microfilm  
5 Indices

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25 Transcribed by: Sonya Ledanski Hyde

1 A P P E A R A N C E S :

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17 BY: GREGORY M. DEXTER

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1 P R O C E E D I N G S

2 MS. BROWN: Good afternoon, Your Honor. We have  
3 two matters on today. I don't know if you have a preference  
4 as to which one you'd like to deal with first.

5 THE COURT: Why don't we deal with the issue with  
6 the Excel spreadsheets first.

7 MS. BROWN: Okay, I'm going to let my colleague,  
8 Cara, speak.

9 THE COURT: Okay.

10 MR. DEXTER: It's our letter, so, I'll take it.

11 THE COURT: Okay.

12 MR. DEXTER: Your Honor --

13 THE COURT: Would you speak into the microphone so  
14 we can pick you up?

15 MR. DEXTER: Sure. In reviewing the letters again  
16 today, it looks to me --

17 THE COURT: Stand at the podium, because the  
18 microphone will pick you up better then.

19 MR. DEXTER: Okay.

20 THE COURT: That's the podium.

21 MR. DEXTER: Didn't see that there is a microphone  
22 here.

23 THE COURT: There's a microphone, trust me.

24 MR. DEXTER: Thank. (indiscernible) only saw that  
25 one.

1 THE COURT: Go ahead.

2 MR. DEXTER: In reviewing the letters today it  
3 looks like it's merely a matter of how a trustee defines  
4 work product, as compared to we define work product. It  
5 really seems be as simple as that. And the Trustee is  
6 attempting to assert the work product privilege over things  
7 that are not work product, because they're simply facts,  
8 such as when a certain consultant reviewed something. And  
9 that's really all we're seeking the disclosure of.

10 We're not seeking the consultant's opinions on  
11 what he saw, or anything of that nature. Really, all we  
12 want is the part of the spreadsheet that shows the fact that  
13 the consultant reviewed and (indiscernible) on a certain  
14 day, or saw --

15 THE COURT: Well, there's a little more to it than  
16 that, and I reviewed the columns. Yes, a lot of the columns  
17 refer to who looked at what file on what day and say nothing  
18 else, but there are other columns or other notations. I  
19 don't want to necessarily say what they are until the work  
20 product issue is resolved.

21 So, obviously, there's more to it than just who  
22 looked at what on a particular day -- which I agree, it's  
23 not work product, because it's something that would go in  
24 the time record. Then the logical extension of that would  
25 be that we'd have to file those time records under seal and

1 all fee applications under seal. But there's other stuff  
2 there.

3 But this is really the Trustee's issue. Let me  
4 hear from the Trustee. Let me just make sure I understand  
5 one thing. You're not arguing that somehow the Trustee  
6 waived the work product privilege (indiscernible) producing  
7 this stuff, are you?

8 MR. DEXTER: I don't think we need to get there.

9 THE COURT: Okay.

10 MR. DEXTER: I don't think we need to get there.  
11 If we need to get there, I'd like to reserve the opportunity  
12 to address that.

13 THE COURT: Now is a good time.

14 MR. DEXTER: Well, as a threshold matter, you can  
15 only assert work product privilege or you can only assert  
16 clawback over things that are first work product and --

17 THE COURT: That goes to your argument that it's  
18 not work product. If it is work product, are you arguing  
19 that the Trustee waive the work product privilege by  
20 disclosing it?

21 MR. DEXTER: I think that -- yeah, I think that  
22 has been waived.

23 THE COURT: I thought that there was a litigation  
24 protective order which said that if work product or  
25 attorney-client privilege was inadvertently produced, that

1 there was no waiver.

2 MR. DEXTER: Yeah, that has to do with information  
3 that's actually inadvertently produced.

4 THE COURT: Right.

5 MR. DEXTER: But not information that you produce  
6 and you wait several years and then you decide you want to  
7 make a redaction. That deals with -- and the language is a  
8 little confusing. There's two paragraphs in the LPO that  
9 are a bit ambiguous.

10 THE COURT: Well, this is a discovery issue, and I  
11 thought there was a particular paragraph that talked about  
12 turning other materials in discovery, I guess,  
13 inadvertently, that included work product or privileged  
14 materials, and that that didn't constitute a waiver. You're  
15 arguing that they didn't inadvertently do it, that they did  
16 it on purpose?

17 MR. DEXTER: Exactly. And now they're trying to  
18 re-designate it as work product.

19 THE COURT: Well, I agree that they turned over  
20 the files on purpose, but do you think they turned over the  
21 privilege materials on purpose so that they could wait  
22 several years to then get it back?

23 MR. DEXTER: I don't know if was intentional, but  
24 that's not the standard for showing of inadvertence. It was  
25 something that they filed and used on multiple occasions,

1 and for several years --

2 THE COURT: But they didn't use it in the native  
3 format. I thought they used it in PDF format, which didn't  
4 include these columns. That's what they say.

5 MR. DEXTER: I don't know specifically --

6 THE COURT: Is that wrong, what they say? That  
7 when they used it, it was in the native format and didn't  
8 include -- not the native format, the PDF -- and didn't  
9 include the columns?

10 MR. DEXTER: I don't know how to answer that  
11 question, Your Honor.

12 THE COURT: You're the one who's made that charge,  
13 or Ms. Chaitman did.

14 MR. DEXTER: Well, we've made the charge that they  
15 have represented, number one, that the Trustee never had  
16 possession of any trading records.

17 THE COURT: Let's get off of that. Let's talk  
18 about the Excel spreadsheets. One of the arguments that was  
19 made in the letter was that these spreadsheets were already  
20 used in other court proceedings, and that implied that what  
21 was used in the other court proceedings included the  
22 information that the Trustee is now saying is privileged.  
23 The Trustee came back and said, hey, wait a minute, what we  
24 used in these other proceedings were the PDF copies of these  
25 documents, which didn't include the columns that we're now



1 talking about. Are you saying that that's not true?

2 MR. DEXTER: Your Honor, quite honestly, I don't  
3 know. Our letter didn't address that.

4 THE COURT: No, your letter raised that issue.

5 MR. DEXTER: I think our letter said that they  
6 have raised the fact that they were never in possession of  
7 any Madoff trading records.

8 THE COURT: No, no, no. We're not talking about  
9 that. Hold on. Let me try to get them. Do you know what  
10 I'm referring to?

11 MS. MCGOURTY: Yes.

12 THE COURT: here is it in the letter?

13 MS. MCGOURTY: Your Honor, I believe it's on page  
14 two of the September 8th letter to Your Honor, the first  
15 full paragraph beginning, "However, even if the indices ..."

16 THE COURT: Yeah, it's right there, saying Ms.  
17 Chaitman accused them of using these same documents that  
18 he's now trying to clawback. But that's ... and then the  
19 Trustee came back and said that's not what happened. Did  
20 you go and check to see what was used in the proceeding  
21 before Judge (indiscernible)?

22 MR. DEXTER: What this paragraph, with "However  
23 ..., " it refers to, yes, the indices being used in front of  
24 Judge (indiscernible), have I checked whether the Trustee's  
25 assertion was correct or not? No, I haven't checked yet.

1 We've never come back and represented to this Court that the  
2 Trustee was wrong in that assertion.

3 THE COURT: But I thought you were arguing that  
4 use of these documents in another court proceeding was,  
5 essentially, a waiver of the privileges. Are you now arguing  
6 that now?

7 MR. DEXTER: No, I am. And I think it absolutely  
8 is it has information that the Trustee is now attempting to  
9 clawback.

10 THE COURT: Okay. And the Trustee came back and  
11 said, what we used in these other proceedings was not --  
12 didn't contain the privileged information. And my question  
13 is, did you go and check to see what was used in these other  
14 proceedings? In other words, did you seek to confirm the  
15 veracity of what the trustee said in reply to what was in  
16 the September 8th letter?

17 MR. DEXTER: No, I already admitted that I have  
18 not.

19 THE COURT: All right.

20 MR. DEXTER: The Trustee, I mean if the Trustee  
21 had proof of that, then I agree, completely.

22 THE COURT: Well, the Trustee says that, and I  
23 don't hear you refuting it. You think I should have a trial  
24 on comparing what the Trustee gave to Judge (Indiscernible)  
25 and what the information is there? Let me hear from the

1 Trustee.

2 MS. MCGOURTY: Good afternoon, Your Honor.

3 THE COURT: Good afternoon.

4 MS. MCGOURTY: Cara McGoutry for the Trustee. I  
5 guess I'll start by addressing some of the issues that just  
6 came up. One is that the Trustee has not used the native  
7 Excel version.

8 THE COURT: That seems to be an issue that's no  
9 longer an issue.

10 MS. MCGOURTY: This situation is basically the  
11 exact reason we have clawback agreements, and why there's a  
12 federal rule of evidence (indiscernible).

13 THE COURT: Let me ask you a question. I looked  
14 at the materials. As Mr. Dexter said, a lot of the  
15 information your claiming is work product, or whatever,  
16 simply identifies who looked at what box on what day. Tell  
17 me why that's work products?

18 MS. MCGOURTY: It goes into kind of the behind-  
19 the-scenes analysis.

20 THE COURT: There was no analysis. It's the kind  
21 of information you have in a time record, if an attorney had  
22 done it. So, why is that work product?

23 MS. MCGOURTY: Some of that might be a bit of a  
24 borderline.

25 THE COURT: Well, you're asserting, in a privilege

1 log, which doesn't give me a lot of information, frankly,  
2 that that's work product.

3 MS. MCGOURTY: We voluntarily disclosed these  
4 indices, and we did so to provide information of the dataset  
5 that we have, what we have, where it came from, when it was  
6 restored, the amount. We didn't intend ... that was what  
7 we, of course, intentionally disclosed.

8 THE COURT: Okay. You disclosed it. And the  
9 issue now is whether it's work product, which you would have  
10 a burden to show. I asked you about some specific entries,  
11 which don't appear to be work product, because they just say  
12 who looked at what box on what day; the type of information  
13 defined, and time records. There are other entries which,  
14 frankly, I don't understand their relevance. So, to save  
15 time, if you're going to insist -- and by the way, the  
16 categories of material are very small. They repeat, but  
17 there's, you know, maybe five or six categories of material.  
18 You're going to have to explain to me in an in camera  
19 affidavit -- you can give Ms. Chaitman and Mr. Dexter a copy  
20 of it, since they know it's in the documents, to explain why  
21 these categories are work product. You also allege  
22 attorney-client now, I understand, attorney-client  
23 privilege.

24 MS. MCGOURTY: Some of the entries in the  
25 spreadsheet, are a method of communicating between our --

1 THE COURT: Well, you know what the elements of an  
2 attorney-client privilege are and you can show me how they  
3 were communicated for the purpose of getting legal advice.  
4 But you have to prove it. You can't just give me a  
5 privilege log with, essentially, two entries saying notes  
6 and comments and things like that, because that doesn't do  
7 it. As you can see, we've already isolated certain  
8 information which, you're going to be hard pressed to  
9 convince me is work product. Okay? When can you can do  
10 that?

11 MS. MCGOURTY: How long would you like?

12 THE COURT: It's your information that's out  
13 there.

14 MS. MCGOURTY: A week?

15 THE COURT: Okay, a week from today? Week from  
16 today.

17 MS. MCGOURTY: Would you like me to discuss what  
18 the inadvertence versus intentional disclosure, to Mr.  
19 Dexter?

20 THE COURT: Yeah, thank you. I haven't had a good  
21 reason as to why the Trustee would produce this stuff,  
22 inadvertently, if the Trustee thought it was work product.  
23 I'm also familiar with how you collapse the columns on the  
24 spreadsheet.

25 MS. MCGOURTY: I assure you, I'm very familiar

1 with that as well, at this point.

2 THE COURT: All right. I'll adjourn this to  
3 August 29th -- August, November 29th.

4 MS. BROWN:

5 MS. MCGOURTY: Thank you, Your Honor.

6 THE COURT: This does seem to be a big to-do about  
7 nothing, I have to tell you. All right, next. The PW  
8 proceeding.

9 MS. BROWN: Your Honor, who would you like to hear  
10 from first?

11 THE COURT: Well, my question is, aren't we ready  
12 for trial?

13 MS. BROWN: Seanna Brown, on behalf of the  
14 Trustee. Your Honor, we have reviewed the transcript from  
15 the motion of limine hearing back in August -- April, sorry.  
16 And our position is that there are now pending motions that  
17 require --

18 THE COURT: Well, that's a question I had because  
19 I was reading the Trustee's most recent status report, and  
20 paragraph 90 says, "No decisions as to the remaining motions  
21 in the limine have been issued." I thought I had decided  
22 everything, either from the bench or in a written decision.  
23 So, what did that paragraph mean?

24 MS. BROWN: I guess I'd have to say that that  
25 paragraph was an error, maybe it was based on an old

1 (indiscernible) report.

2 THE COURT: Mr. Dexter, do you think that there  
3 are any unresolved motions in limine?

4 MR. DEXTER: Do I think there are any pending  
5 motions in limine?

6 THE COURT: In other words, the question I had is,  
7 the Trustee's most recent status report implied that there  
8 may be some unresolved questions regarding the motions in  
9 limine as they concern the PW proceeding. Ms. Brown just  
10 said there aren't any.

11 MR. DEXTER: Their letter was accurate, not what  
12 is being represented today; that there are pending motions.

13 THE COURT: What hasn't been decided?

14 MR. DEXTER: The motions that were filed by the  
15 Blums that --

16 THE COURT: Well, the Blums are out of the case  
17 now.

18 MR. DEXTER: Right, but we filed joinders to those  
19 motions, so those motions are still pending.

20 THE COURT: Okay, but the -- some had to do with  
21 the Blums' own expert, but ... and I don't see how you can  
22 make the Blums' expert testify. But I went through the  
23 transcript also. And the only two motions seem to be the  
24 admissibility of the Collura and Greenblatt flat reports as  
25 to which there's no formal order, and the issue with Mr.

1 Blecker. Are there any others?

2 MR. DEXTER: Yes, there are.

3 THE COURT: What? Which ones are they?

4 MR. DEXTER: There are issues relating to the  
5 exclusion of certain records of the Trustee on the grounds  
6 of those records being inadmissible hearsay.

7 THE COURT: But didn't I overrule all of the  
8 objections relating to Collura and Greenblatt with the  
9 exception of I wouldn't let, hear them say that if the  
10 missing records existed they would support the conclusion.  
11 Didn't I say that?

12 MR. DEXTER: I don't know how to answer that.  
13 I'll defer that to (indiscernible).

14 THE COURT: All right, so, let me read from page  
15 42 and 43 of the transcript of April 17th. This is after  
16 the extended argument. I copied the wrong page. It's on  
17 page 41 and 42. And, essentially, what I said was I wanted  
18 to hear from the Collura and Greenblatt, about what it is  
19 they did, since it was a bench trial I was not particularly  
20 concerned about hearsay because I could understand -- I know  
21 what hearsay is and I'm not going to be prejudiced. You  
22 wouldn't be prejudiced. I know what I can use and not use.  
23 And that the only thing I wouldn't do is allow them to  
24 testify that if the missing records weren't missing they  
25 would support, you know, they would further support the



1 conclusion that they were arguing for. So, that was  
2 resolved that way, wasn't it? Did you read the transcript  
3 before you came here?

4 MR. DEXTER: That transcript (indiscernible) ...

5 THE COURT: Because that's what we're talking  
6 about.

7 MR. DEXTER: Your Honor, quite honestly, I haven't  
8 read that in quite a while. And today we're going to have a  
9 discussion about whether or not the motions that we filed a  
10 joinder for, whether that joinder is actually going to be  
11 effective because of a transcript in April, I'm not prepared  
12 to have that conversation, unfortunately.

13 THE COURT: All right, I dealt with Collura and  
14 Greenblatt. I said that I would hear their testimony,  
15 except for the conclusion that I mention, the record is so  
16 ordered. What other motions are there, that were  
17 unresolved.

18 MR. DEXTER: Our letter, on October 17, 2017; this  
19 is a doc ID: 16-788.

20 THE COURT: Yeah.

21 MR. DEXTER: So, we joined in every single aspect  
22 of the --

23 THE COURT: Just tell me -- don't tell me what you  
24 joined. It was a universe of motions, which ones weren't  
25 decided?

1 MR. DEXTER: Which ones ...?

2 THE COURT: Were not decided. We've dealt within  
3 your third paragraph of the letter of October 17th, the  
4 Collura and Greenblatt aspect of the Blum motion. I've just  
5 told you how it's resolved. What else?

6 MR. DEXTER: Well, there were multiple aspects of  
7 that motion. That's --

8 THE COURT: I denied the motion, except for the  
9 conclusion. Are there any other motions besides the Collura  
10 and Greenblatt motions? I want to hear them testify.

11 MR. DEXTER: I know that within those motions,  
12 whether they're on ... that there are different aspects to  
13 those motions --

14 THE COURT: What?

15 MR. DEXTER: -- whether they're separate motions  
16 or not.

17 THE COURT: What? What isn't decided?

18 MR. DEXTER: For example, that the Trustee cannot  
19 rely on the ancient records exception for hearsay, things of  
20 that nature. I don't see how any of that was decided.

21 THE COURT: Everything was decided. I said, and  
22 I'm repeating myself now, I want to hear what Collura and  
23 what Greenblatt did. The issue in this case is how to  
24 compute the net equity of the participating claimants, which  
25 I guess are your clients now. The Trustee is entitled to

1     rely upon the books and records of the SIPA debtor or  
2     whatever else is out there -- I'm paraphrasing -- that would  
3     enable him to determine the net equity claims. So, I don't  
4     know what these various hearsay exceptions have to do with  
5     it. You can argue that the records are unreliable, that  
6     they're incomplete. And you can ask, obviously, the experts  
7     on the stand. But I have to hear what they have to say.  
8     So, what else is not decided?

9             MR. DEXTER: But even if you hear what they have  
10     to say, doesn't it then it become a matter of whether the  
11     books and records are themselves admissible or not?

12            THE COURT: No. No, the Trustee is trying to  
13     determine from the books and records and any other evidence  
14     he has, what the net equity claim is. There's no  
15     requirement that the records have to be admissible. It may  
16     go to the weight that they're inaccurate or they're  
17     incomplete, or something like that. But this is what the  
18     Trustee relied on to determine net equity.

19            MR. DEXTER: The rules of hearsay are not are  
20     matter of weight --

21            THE COURT: Look, I've heard enough. You're just  
22     arguing with me. I told you how I ruled. Aside from  
23     Collura and Greenblatt, is there anything else?

24            MR. DEXTER: If I may, would you mind if we just  
25     send a followup letter on this issue tomorrow?

1 THE COURT: No. Today is the day. I'm scheduling  
2 -- is this case ready for trial?

3 MS. BROWN: Yes, Your Honor.

4 THE COURT: Scheduling a trial. How long is it  
5 going to take to try the case?

6 MS. BROWN: To try the case we anticipate it would  
7 take five days.

8 THE COURT: I also said that I would try Mr.  
9 Blecker's issue.

10 MS. BROWN: We're anticipating that that would be  
11 part of it. So, Your Honor, what we had in mind was two  
12 days for experts, two days for fact witnesses, and maybe a  
13 half day to do closing arguments if Your Honor permits, and  
14 any cleanup. So, one of the requests that we would like to  
15 make is, if it would be possible to schedule the experts on  
16 consecutive days, even if we could never -- I doubt that  
17 Your Honor has five full days for us.

18 THE COURT: No, I don't.

19 MS. BROWN: But if there is any way to accommodate  
20 having the experts testify close in time, and perhaps even  
21 on consecutive days, that would be incredibly beneficial. I  
22 do want to mention to Your Honor, that we, the parties have  
23 not yet started the negotiation of the pretrial order. So,  
24 we would need --

25 THE COURT: You don't need a pretrial order in

1 this. I've heard so much about this.

2 MS. BROWN: The only thing that I would say that  
3 the --

4 THE COURT: And it's just going to  
5 (indiscernible).

6 MS. BROWN: Okay.

7 THE COURT: And cause more letter writing and  
8 litigation in discovery. I understand what the PW issue is,  
9 I understand what the objections are to it. I assume that  
10 Collura and/or Greenblatt are going to testify as to what  
11 they did and how they came to the conclusion that PW meant  
12 whatever it meant. You know, I'll decide whether or not  
13 that's correct. I think, at the end of the day, at best,  
14 you're going to have, in every individual case, after we get  
15 done with Mr. Blecker, is maybe you've satisfied your  
16 initial burden of going forward or whoever's got the burden  
17 of proof. Maybe it's some evidence.

18 MS. BROWN: I mean, we od, obviously, have  
19 (indiscernible) numbered and approved, but we could address  
20 it in post-hearing briefing if that would be more helpful to  
21 Your Honor. We don't have to do it in a pretrial order.

22 THE COURT: There's no way to do this other than  
23 for you to go first (indiscernible) this issue.

24 MS. BROWN: Correct. We are planning on going  
25 first. But just because we go first doesn't necessarily

1 mean we have the ultimate burden of proof. And if I could  
2 be very specific about what I'm talking about, I'm not  
3 speaking about the omnibus issue. As to Mr. Blecker, I  
4 think that SIPA is clear, that it's the Claimant's burden.  
5 And so, I think that there's a distinction between the  
6 omnibus and the individual claims proceeding.

7 THE COURT: Listen, Mr. Blecker is going to say,  
8 "I never got a single distribution from this account." And  
9 you're going to say, "Mr. Blecker, you testified that this  
10 account, this investment was so good that I wouldn't take  
11 any money out of it for 15 years." And when he did take  
12 money out of it, he only took out \$6,000 more than he put  
13 int. That's what it's going to be, right? Plus, he's got  
14 these handwritten notations --

15 MS. BROWN: Yes.

16 THE COURT: -- which I previously said I would  
17 receive.

18 MS. BROWN: You did.

19 THE COURT: I don't know if you ever got the  
20 doctor's note that was promised by Ms. Chaitman.

21 MS. BROWN: We have not. The position that Ms.  
22 Chaitman has taken is that because Your Honor did not order  
23 her to produce it, she's not going to.

24 THE COURT: Okay, fine. I will probably accept  
25 ... you know, if you tell me that those handwritten

1 notations were in the documents when you received them,  
2 without anything else, I'm just, you know, going to receive  
3 it as that -- no; probably accept whatever explanation you  
4 think they merit.

5 MS. BROWN: Okay. Thank you, Your Honor.

6 THE COURT: All I'm saying is this argument,  
7 there'll be burden of proof. He's going to testify he  
8 didn't get it. And we're going to go from there. And I'm  
9 either going to believe him or not believe him.

10 MS. BROWN: Okay.

11 THE COURT: Let me see if I can find you a couple  
12 of days.

13 MS. BROWN: Your Honor?

14 THE COURT: Yes?

15 MS. BROWN: We are talking currently about the  
16 experts testifying. But, as you know, we did depose several  
17 of (indiscernible) employees. We do have, we've offered to  
18 Ms. Chaitman, to try to see if we could work out that we  
19 would submit their testimony by deposition designation, so  
20 as to avoid having multiple fact witnesses come into this  
21 courtroom. We think that's very efficient. The depositions  
22 were pretty narrow on this one issue. To bring them in here  
23 I think could really delay and lengthen the trial. So, that  
24 was one issue that we'd like to have resolved.

25 THE COURT: You can talk about it, but I'm

1 scheduling the trial because, as I said, every time you try  
2 to work things out, it just delays it.

3 MS. BROWN: Okay.

4 THE COURT: You could certainly -- look, if you  
5 want to agree to cross-designate depositions, that's fine.

6 MS. BROWN: I guess the issue is, we're unlikely  
7 to get an agreement based on prior history. So, I would ask  
8 that we --

9 THE COURT: What does Rule 32 say about the --

10 MS. BROWN: Rule 32 -- I will be honest with you,  
11 Your Honor, I think under Rule 32, probably the only one of  
12 the Trustee's fact witnesses that would be unavailable  
13 within the meaning of that rule, would be Ms. Bongiorno, who  
14 is currently incarcerated in Florida. And, obviously, we  
15 have the Blecker issue about whether or not he's  
16 unavailable. The other fact witnesses are within --

17 THE COURT: He's unavailable because he's outside  
18 of subpoena (indiscernible), although he's --

19 MS. BROWN: No --

20 THE COURT: -- (indiscernible) claim.

21 MS. BROWN: He is. The other witnesses are within  
22 the jurisdiction of the Court.

23 THE COURT: All right. So, you know, I don't know  
24 how I can force anybody as to those witnesses, to agree to  
25 cross-designate. And you're probably not going to be able



1 to get an agreement, so, let's just schedule a trial.

2 MS. BROWN: Okay, Your Honor.

3 THE COURT: How about January 4th and 5th?

4 MS. BROWN: Your Honor, the only issue I have with  
5 that date is our actually territoriality appellate brief is  
6 due like January 11th and I do work on that. But if that's  
7 the only dates that Your Honor has --

8 THE COURT: Well, no, I have after that, I have a  
9 lot of dates.

10 MS. BROWN: Okay, that would be better if there  
11 was any way to accommodate that.

12 THE COURT: Let's make it Thursday, the 18th of  
13 January and Friday the 19th. We'll start with those two  
14 days for the experts.

15 MS. BROWN: And based on what we've discussed here  
16 today, Your Honor, the Trustee will plan to put his witness  
17 on first.

18 THE COURT: Yes. I'm sure they don't have any  
19 witnesses. I'm assuming, Mr. Dexter, you don't have any  
20 witnesses on the omnibus issue; you have witnesses in your  
21 individual cases. Is that right?

22 MR. DEXTER: I don't think we're intending on  
23 calling anyone in the omnibus issue.

24 THE COURT: What I say --

25 MS. BROWN: On Mr. Blecker's pretrial disclosures

1 they did also list as witnesses the smattering of BLMIS that  
2 we disposed.

3 THE COURT: Why don't we do this then? Let's say  
4 that by November 30th, the parties exchange witness lists  
5 and exhibit lists. And to the extent you haven't produced  
6 the exhibits, produce the exhibits that are on your exhibit  
7 list, okay?

8 MS. BROWN: Your Honor, does that deadline allow  
9 the parties -- I think the parties should be required to  
10 stick to the witness list that they previously submitted.

11 THE COURT: I don't remember the schedule.

12 MS. BROWN: We did. We already exchanged witness  
13 lists and exhibit lists. We don't really need to do that.

14 THE COURT: If it's done already, that's fine.

15 MS. BROWN: We did that last fall.

16 THE COURT: Okay. All right, see you at 10  
17 o'clock on January 18th. I may have some other matters on  
18 the calendar because it's a regular calendar day. So, we'll  
19 just start the trial after that.

20 MS. BROWN: And, Your Honor, as I mentioned  
21 before, the Trustee was not planning on doing any opening  
22 arguments.

23 THE COURT: Are the witnesses', the experts'  
24 direct testimony simply going to be their reports?

25 MS. BROWN: You mean, would we submit the reports

1 as their direct and only allow cross? Your Honor, we have  
2 talked about that. I do think there is some benefit to the  
3 Court hearing their testimony and hearing their process.

4 So, I --

5 THE COURT: Can't you do that by declaration?

6 MS. BROWN: We certainly could if that would make  
7 it easier for the Court.

8 THE COURT: Well, I'd like to hear the live  
9 testimony but I'm just wondering whether that will expedite  
10 the --

11 MS. BROWN: It could expedite but then you would  
12 only hear the cross examination. And I do think there's a  
13 benefit to you hearing their processes, since you haven't  
14 heard them testify yet in this case.

15 THE COURT: All right.

16 MS. BROWN: Thank you, Your Honor.

17 THE COURT: See you on January 18th.

18 MS. BROWN: Great. Thank you.

19 MR. DEXTER: Thank you, Your Honor.

20 THE COURT: Now, let me jus add one thing. We're  
21 not going to do Mr. Blecker on January 18th. Can I ask a  
22 question? The man is 106 or 107 or something.

23 MS. BROWN: He's 106.

24 THE COURT: Does it make sense to do his case  
25 first and then work in this other testimony?

1 MS. BROWN: The thing that's difficult about this  
2 proceeding, and probably has been since the beginning, since  
3 we've been talking about it, I mean a lot of the evidence is  
4 overlapping. So, I don't know how we just try -- are you  
5 suggesting maybe Mr. Blecker --

6 THE COURT: His personal case. I mean, I would  
7 still have to hear the PW omnibus proceeding. Why don't I  
8 do that? I'll leave it up to the parties to discuss it.  
9 But think about, since he is so elderly, trying his part of  
10 the case first, let him get up and testify that he never  
11 withdrew any money from his \$200,000 account, which is  
12 (indiscernible) issue I think.

13 MS. BROWN: Yes.

14 THE COURT: You can question him about the  
15 handwritten notations. Just think about it. And then we  
16 can do the rest of the stuff, and (indiscernible) decision.

17 MS. BROWN: Is Your Honor suggesting that we have  
18 Mr. Blecker testify in the courtroom?

19 THE COURT: Well, he's got to be unavailable.  
20 This is his case, you know, talking about his own claim  
21 objection, his own claim determination as an objection to  
22 that determination. So, unless I have evidence that he  
23 can't testify -- I guess he's not here, he doesn't come to  
24 his own trial.

25 MS. BROWN: Okay. I mean there is case law that

1 you can't just site the age, you have to provide --

2 THE COURT: No, I understand. I'm saying --

3 MS. BROWN: So, I guess the only thing I'm a  
4 little confused about, is in order for Your Honor to resolve  
5 his claim you'd have to understand how the Trustee  
6 determined net equity overall, which is what we were  
7 planning on presenting through the experts on the omnibus  
8 decision.

9 THE COURT: I wouldn't resolve his claim until the  
10 end of the day, after all the evidence is in. But since he  
11 is 106 or 107, I was just suggesting that maybe we try his  
12 case first.

13 MS. BROWN: Okay. Just as long as Your Honor  
14 wasn't planning on issuing a decision immediately after he  
15 stepped out.

16 THE COURT: No.

17 MS. BROWN: Because we'd, obviously, like to  
18 present the full picture to Your Honor about what we've done  
19 and --

20 THE COURT: I will leave that up to counsel to see  
21 if they can agree to that, if they want to agree to that. I  
22 don't know.

23 MS. BROWN: Agree to having Mr. Blecker's case  
24 first?

25 MR. DEXTER: We'll take it under advisement.

1 Thank you, Your Honor.

2 THE COURT: Okay. Otherwise, we'll start on the  
3 18th.

4 MR. DEXTER: Thank you

5 MS. BROWN: Thank you.

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7 (Whereupon these proceedings were concluded at 2:44 PM)

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing  
transcript is a true and accurate record of the proceedings.

Sonya  
Ledanski Hyde

Digitally signed by Sonya Ledanski  
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Date: November 10, 2017